



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: A.J. Fowler Corporation; Reliable Trash
Service, Inc.
File: B-233326; B-233326.2
Date: February 16, 1989

DIGEST

1. Agency decision to use negotiation procedures, in lieu of sealed bidding procedures, to acquire refuse collection and disposal services is justified where the contracting officer determines that discussions are necessary to ensure that offerors fully understand the performance methods, manning and equipment requirements necessary to adequately perform the contract.
2. Protest that solicitation failed to include options is denied where the contracting officer determined it was not in the government's best interest to include options.
3. Protest that evaluation criteria relating to price are ambiguous is denied since solicitation advises offerors of the broad scheme of scoring to be employed and gives reasonably definite information concerning the relative importance of the evaluation factors in relation to each other.
4. Protest that contracting officer is provided too much discretion in selecting the awardee in a negotiated procurement is denied because the contracting officer is allowed to exercise discretion in accordance with the evaluation language and criteria stated in the solicitation in determining which award will be most advantageous to the government.

DECISION

A.J. Fowler Corporation and Reliable Trash Service, Inc., protest any award under request for proposals (RFP) No. DAKF48-88-R-0220, issued by the Department of the Army for refuse collection and disposal services at Fort Hood,

Texas. The protesters object to the use of negotiated procedures in procuring these services and the contracting officer's decision not to include option periods in the RFP. Reliable also protests that the solicitation is ambiguous as to how price will be evaluated and that the contracting officer is afforded too much discretion in the selection of the awardee.

We deny the protests.

The RFP was issued as a total small business set-aside for refuse collection and disposal services under a firm, fixed price contract for a 1-year period. The contracting officer determined that it would not be in the government's best interest to include option periods in the solicitation because of the anticipated closing of the present landfill at Fort Hood, resulting in uncertainty as to future landfill operations. The solicitation states that a single award will be made which is most advantageous to the government, and lists technical, price, management, and experience as the evaluation factors.

Negotiated Procurement Method

Fowler and Reliable allege that the contracting agency's decision to use negotiated procedures rather than sealed bidding is unreasonable since the services to be performed under the contract are not complicated and do not require any special expertise, other than prior experience. Reliable argues that the circumstances relating to this procurement do not meet the criteria for using a negotiated procurement and the fact that these services have been acquired successfully in the past by sealed bid establishes that there is no reasonable basis to change to a negotiated procurement. Additionally, Fowler states that due to the discretion given to the contracting officer in a negotiated procurement, the contracting officer can arbitrarily reject any proposal and choose whichever contractor he or she prefers. Finally, Fowler contends that the use of a negotiated procurement unfairly restricts competition because small businesses may not be capable of writing an acceptable technical proposal, although they have the experience and capability to perform the contract.

The Army states that it is necessary to obtain technical proposals and have the opportunity to conduct discussions with offerors to ensure that the prospective contractor has a clear understanding of the manning, methods and equipment needed to perform the contract. In this regard, the Army states that the services provided for under this solicitation at the Fort Hood installation are extensive

since Fort Hood has a daytime population of over 60,000 individuals and covers over 330 square miles, consisting of office complexes, industrial operations and family quarters. The Army explains that based on Fort Hood's size, its refuse collection and disposal requirements are larger than those of many cities.

Further, the Army anticipates closing of the current landfill site during the contract period, and many of the issues relating to the new site remain unresolved. Therefore, the Army emphasizes that it is necessary to review technical proposals to ensure the offerors have sufficient experience, management, and flexibility to continue the refuse collection and disposal services under transition period in which the contractor could be performing under adverse conditions.

According to the Army, the landfill operation is unsupervised for the most part, and it relies on the contractor's knowledge of and compliance with state and local environmental regulations to fulfill the contract requirements. Because the consequences of environmental noncompliance can be devastating to the health and safety of individuals and to the fulfillment of Fort Hood's mission, and result in fines and penalties imposed against the government, the Army determined it was critical to solicit technical proposals to ensure the offerors' understanding of and compliance with the environmental regulations.

Based on all of these facts, the Army states that there were significant factors other than price which must be considered in the selection of a contractor, and therefore determined that the negotiated method of procurement was appropriate under the circumstances. We agree with the Army.

The criteria which govern the selection of a procurement method are contained in the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(2)(A) (Supp. IV 1986), which requires an agency to solicit sealed bids if:

- "(i) time permits the solicitation, submission, and evaluation of sealed bids;
- "(ii) the award will be made on the basis of price and other price-related factors;
- "(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

"(iv) there is reasonable expectation of receiving more than one sealed bid."

The enactment of CICA eliminated the statutory preference for sealed bids. A.J. Fowler, B-232367, Oct. 31, 1988, 88-2 CPD ¶ 418. CICA mandates the use of full and open competition, and to achieve it agencies are required to use the competitive procedures or combination of competitive procedures that is best suited under the circumstances of the procurement. 10 U.S.C. § 2304(a)(1)(B). The determination regarding which competitive procedure is appropriate essentially involves the exercise of business judgment by the contracting officer. KIME Plus, Inc., B-231906, Sept. 13, 1988, 88-2 CPD ¶ 237. We will not question the determination that the need for offerors to describe their approach to, and for there to be an opportunity to discuss, non-price-related-factors requires the use of negotiation, unless that determination is shown to be unreasonable. Essex Electro Engineers, Inc., 65 Comp. Gen. 242 (1986), 86-1 CPD ¶ 92.

Here, we do not think the protesters have shown that the contracting officer's decision to acquire these services by negotiation is unreasonable. On the contrary, due to the circumstances surrounding the Fort Hood acquisition--such as the probable closing of the landfill during the contract term and the consequences of a contractor's noncompliance with environmental regulations--it is reasonable for the contracting officer to base award on other than price and price-related factors, and to evaluate technical proposals and conduct discussions to determine the offeror's technical approach, management organization and prior experience in fulfilling the contract requirements. Our Office has recognized concerns such as these as legitimate reasons for choosing to procure through negotiation. See KIME Plus, Inc., B-231906, supra.

We do not think the protesters' objections, which consist of speculation that the negotiation process may be subject to abuse or the fact that these services have been acquired successfully in the past by sealed bid, establish that the Army's choice of negotiation was unreasonable. Furthermore, Fowler has provided no support for its bare assertion that negotiated procedures discourage certain small businesses from competing--even where as here, the procurement is a total small business set-aside--because they lack the skills to prepare acceptable technical proposals.

Failure to Include Option Periods In the Solicitation

Both protesters challenge the contracting officer's decision not to include option periods in the solicitation as unreasonable and not in the best interests of the government. The protesters further allege that the decision to exclude options was made to guarantee that the incumbent contractor is awarded the solicitation, since an offeror other than the incumbent cannot submit a competitively priced proposal which also reflects the costs of equipment needed to perform the contract, if the contract period is 1 year or less.

The Army states that pursuant to Federal Acquisition Regulation (FAR) § 17.202(a), it is within the discretion of the contracting officer whether to include options in a solicitation. The Army maintains that the contracting officer's decision in this case not to include options is reasonable due to the anticipated closing of the landfill, which will result in uncertainty as to future operations, and that, once future requirements are known relating to the landfill, a new solicitation will be issued containing base and option years. Furthermore, the Army contends that there has been no showing by the protesters that the contracting officer's decision not to include options is unreasonable. We agree with the Army.

We are not aware of any law or regulation which requires the agency to include options in this solicitation. FAR § 17.202(a) merely states that contracting officers may include options when it is in the government's interest. Where, as here, the contracting officer reasonably determines that it is not in the government's best interest to include options because of the uncertainty of the requirement, our Office will not disturb such a finding, and the fact that the protesters disagree with this determination does not establish that it was unreasonable. See Operations Service Systems, Inc., B-229747, Mar. 3, 1988, 88-1 CPD ¶ 227.

We find the protesters' other allegation, that they cannot submit competitively priced proposals because options are not included in the RFP, to be without merit also. As the protesters acknowledge, the government is not required to exercise an option; thus, even if the solicitation contained options as the protesters suggest, there is no guarantee that the awardee would be able to amortize the costs of the equipment used in contract performance over the base and option years.

Evaluation of Proposals

Reliable alleges that the solicitation is ambiguous relating to how price will be evaluated and believes that the contracting officer is given too much discretion in awarding the contract. The relevant solicitation language being challenged by Reliable provides as follows:

"Of the factors set forth above, the technical factor is substantially more important than any other factor. Price is less important than technical but slightly more important than both management and experience. The management and experience factors are approximately equal in importance.

Price will not be numerically scored but it will be fully evaluated using price analysis techniques. In selecting the best overall proposal, the government will consider the value of each proposal in terms of the quality offered for the price. The importance of price in the selection will increase as the quality differences between the proposals decrease."

The Army responds that the evaluation language is clear and was drafted according to current internal guidance. The Army states that the language indicates that the government will consider technical criteria to be more important than price, but as the technical proposals become similar in quality, price will become more important in the selection process.

A solicitation must clearly advise offerors of the broad scheme of scoring to be employed and give reasonably definite information concerning the relative importance of the evaluation factors in relation to each other. This does not mean, however, that the disclosure of the precise numerical weights to be used in the evaluation is required. Associated Chemical and Environmental Services, et al., B-228411.3 et al., Mar. 10, 1988, 67 Comp. Gen. _____, 88-1 CPD ¶ 248.

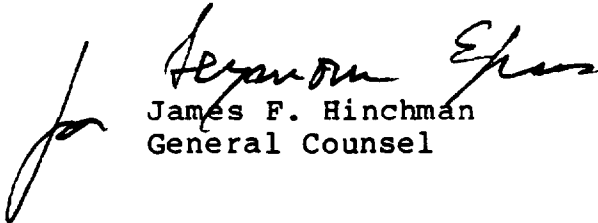
Here, the solicitation provides that award will be based on the offer most advantageous to the government, describes the evaluation criteria, and contains a narrative description as to the relative order of importance of these criteria. The solicitation specifically advises offerors that technical considerations are the most important factor, price is less important than technical but more important

than management and experience, and that the last two factors are weighted equally. The RFP further advises offerors that although price will not be numerically scored, it will be evaluated, and as the proposals become closer in quality, price will increase in importance in the selection process. Based on the solicitation language, it is our view that the offerors are provided with sufficient information relating to the evaluation factors, how the proposals will be evaluated and how price will be used in the evaluation process. Therefore, protester's complaint that the evaluation language relating to price is ambiguous is without merit.

Reliable's assertion that the contracting officer has been given too much discretion in the award process likewise is without merit. Contracting officers are granted wide latitude to exercise business judgment in the contracting process. See FAR Subpart 1.6. Since the evaluation of proposals is a part of the judgment function vested in the contracting officer, it is reasonable for the contracting officer to exercise discretion in accordance with the evaluation language criteria in determining which award will be most advantageous to the government.

Finally, Reliable has requested reimbursement of its protest costs, including attorneys' fees. Under our Bid Protest Regulations, a protester is entitled to such fees only if we determine that a solicitation does not comply with a statute or regulation. 4 C.F.R. § 21.6(d) (1988). Because there has been no showing of any violation of a statute or regulation by the Army in this case, Reliable is not entitled to recover its protest costs.

The protests are denied.



James F. Hinchman
General Counsel